Supreme Court, U.S.
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No. 99-1478

IN THE

Supreme Court of the United States

ALEXANDER J. LABORA,

Petitioner,

v.

MCI TELECOMMUNICATIONS CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

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April 6, 2000

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QUESTIONS PRESENTED

1. Whether the decision below conflicts with this Court's ruling in *Friends of the Earth, Inc. v. Laidlaw Environmental Services*, 120 S.Ct. 693 (2000), when the "voluntary cessation" doctrine has no applicability to this case.

2. Whether the Court of Appeals correctly followed settled law in deciding that petitioner's claims relating to a contested long distance telephone service bill were mooted when petitioner received a credit for $1.52, the entire disputed amount of the bill.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondent MCI WorldCom Network Services, Inc. ("MWNSI") (formerly MCI Telecommunications Corp.) states as follows:

The parent corporation of MWNSI is MCI WORLDCOM, Inc. ("MCI WorldCom"), a Georgia corporation which, along with wholly owned subsidiaries, provides local and long distance telecommunications services domestically and internationally.

MCI WorldCom is a publicly traded company on the Nasdaq National Market under the symbol "WCOM." No publicly held company owns 10 percent or more of MCI WorldCom stock.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

RULE 29.6 STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF CITED AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 3

I. This Court's Decision in Friends of the Earth Does Not Alter the Validity of the Lower Courts' Decisions In This Case 4

II. Labora's Allegations of Misapplication of Settled Principles of Law do not Warrant Review 7

A. The Credit Issued By MCI Mooted Labora's Claims 7

B. The Amount Of The Credit Was Sufficient To Moot Labora's Claims 8

C. The June Bill Did Not Establish That This Case Fell Within An Exception To The Mootness Doctrine 9

D. The Class Certification Motion Does Not "Relate Back" Under These Circumstances .. 9

CONCLUSION 10

TABLE OF CITED AUTHORITIES

Page(s)

CASES:

AT&T Co. v. Central Office Telephone, Inc., 524 U.S. 214 (1998) 8

Cahnmann v. Sprint Corporation, 133 F.2d 484 (7th Cir. 1998) 8

Chicago Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292 (1986) 6

City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283 (1982) 5, 6

Erie v. Pap's A.M., 2000 U.S. LEXIS 2347 (2000) 6

Friends of the Earth, Inc., v. Laidlaw Environmental Services, 120 S.Ct. 693 (2000) . . . . . i, 3-6

Guaranty Nat'l Bank v. Roper, 445 U.S. 326 (1979) 4, 7

Jews for Jesus, Inc. v. Hillsborough County Aviation Auth., 162 F.3d 627 (11th Cir. 1998) 5

Lewis v. Continental Bank Corp., 494 U.S. 472 (1990) . . . 8

Marcus v. AT&T Corp., 138 F.3d 479 (2d Cir. 1998) 8

MCI Telecommunications Corp. v. Graham, 7 F.3d 477 (6th Cir. 1993) 8

Northeastern Fla. Contractors v. Jacksonville, 508 U.S. 656 (1993) 6

Preiser v. Newkirk, 422 U.S. 395 (1975) 6

Secretary of Labor v. Burger King Corp., 955 F.2d 681, 684 (11th Cir. 1992) 5

Table of Cited Authorities (continued)

Page(s)

Socialist Workers Party v. Leahy, 145 F.3d 1240, 1247 (11th Cir. 1998) 5

United States Parole Comm'r v. Geraghty, 445 U.S. 388 (1980) 4, 10

U.S. v. W. T. Grant Co., 345 U.S. 629 (1953) 6

Walling v. Helmerich & Payne, 323 U.S. 37 (1944) 6

FEDERAL RULES:

FED. R. CIV. P. 60(b)(2) 2, 3, 9

OPINIONS BELOW

The rulings of the courts below are set forth in Appendices ("App.") A-D of the Petition.

JURISDICTION

Respondent concurs with Petitioner's statement of jurisdiction.

STATEMENT OF THE CASE

Petitioner Alexander J. Labora ("Labora") filed a putative class-action complaint on May 13, 1998, in the United States District Court for the Southern District of Florida alleging that respondent MCI Telecommunications Corporation ("MCI") had engaged in "improper billing practices" (R1-1-7 at ¶34).

Labora was an MCI customer and had received residential long distance service since February 11, 1995 (R1-1-8-Exhibit 1, ¶ 2). Labora previously had contacted MCI's customer service on occasions when he believed he ought to be issued credits, and, in fact, had previously been issued credits by MCI. *Id.* Labora did not contact customer service, however, when he received his April 1998 bill (the "April Bill"). Instead, he filed a complaint alleging that MCI had violated applicable federal and state law "by charging, billing and/or collecting from Plaintiff Labora: (a) for three (3) separate calls purportedly made on 305 643-3051 on March 31, 1998 at 9:32 a.m. and (b) for two (2) separate calls purportedly made on 305 915-0726 on April 3, 1998 at 4:07 p.m." (R1-1-3 at ¶16). Labora sought only monetary damages for MCI's alleged overbillings. The maximum damages Labora sustained (assuming the truth of his allegations) amounted to $1.52 (93¢ for one call on March 31, 1998, 49¢ for one call on April 3, 1998, and 10¢ tax). Pet., App. A at 7a.

MCI believed that the charges were proper,[1] but chose to credit Labora's account $1.52 on June 1998 rather than expend the resources involved in litigating this dispute. Pet., App. C at 7a. MCI then moved on June 18, 1998 to dismiss the complaint on grounds of mootness.

On June 19, 1998, *after* MCI had issued the credit that mooted the case and had filed a motion to dismiss, Labora filed a motion for class certification, accompanied by various discovery requests. MCI responded with a motion to stay pending the District Court's ruling on its previously filed motion to dismiss.

The District Court ruled on July 20, 1998 that Labora's claims were moot as a result of the credit he had received from MCI, and dismissed the complaint for lack of subject matter jurisdiction. Pet., App. C. The District Court similarly dismissed as moot all still pending motions, including Labora's motion for class certification.

On July 22, 1998, Labora filed a motion for rehearing and for relief under Fed. R. Civ. P. 60(b)(2), seeking to vacate the judgment of dismissal on the basis of what he described as "newly discovered" evidence. The proffered "new" evidence consisted of a page from Labora's June 1998 telephone bill (the "June Bill"), which he had received almost a month *before* entry of the judgment of dismissal. Pet., App. D at 14a. Labora claimed that the June Bill contained charges for calls which did not connect. Pet., App. D at 15a. MCI submitted evidence showing that the questioned charges were for phone calls that actually connected. *Id.* Moreover, on August 12,

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[1] MCI's computerized switch records of Labora's calls demonstrate that each call was placed from Labora's home and the charges billed for those calls were consistent with Labora's calling plan and MCI's tariffs. *See* R1-15 and Exhibits thereto.

1998, *after* the complaint had been dismissed with prejudice, but before the District Court had ruled on the motion for rehearing and Rule 60(b)(2) relief, Labora also filed a motion for leave to file an amended complaint.

In an Order dated October 19, 1998, the District Court denied both of Labora's pending motions. The motion for rehearing and Rule 60(b)(2) relief was denied on the ground that Labora's proffered evidence did not qualify as "newly discovered evidence" because Labora had actually come into possession of the allegedly new evidence well *before* entry of the judgment of dismissal. Pet., App. D at 13a-14a. The District Court also found that that the purported new evidence did not justify reopening the proceedings because it was not likely to produce a different result. Pet., App. D at 15a.

The District Court also denied Labora's motion for leave to file an amended complaint, as it had already dismissed the initial complaint with prejudice and now found that there were no grounds for vacating or setting that judgment aside. *Id.* at 15a.

The United States Court of Appeals for the Eleventh Circuit affirmed the District Court without opinion in a *per curiam* order dated December 7, 1999. Pet., App. A.

REASONS FOR DENYING THE WRIT

Labora has not raised any question warranting review by this Court. Labora alleges that there is a conflict between the decisions below and this Court's recent decision in *Friends of the Earth, Inc. v. Laidlaw Environmental Services*, 120 S.Ct. 693 (2000) (*"FOE"*). There is no such conflict. *FOE* applied the long-settled doctrine that the voluntary cessation of a challenged practice does not moot a case brought seeking prospective relief to halt that practice. Labora (correctly) did not argue in the proceedings below that any "voluntary

cessation" by MCI operated to avoid mootness, because Labora's complaint did not request prospective relief to ongoing conduct. Rather, Labora simply sought damages for alleged historical overbilling. In such circumstances, *FOE* is simply irrelevant.

In the balance of his petition, Labora argues at length that the decision below conflicts with this Court's decisions in *Guaranty Nat'l Bank v. Roper*, 445 U.S. 326 (1979) and *United States Parole Comm'r v. Geraghty*, 445 U.S. 388 (1980). In this discussion, however, the petition identifies no "compelling reason" for this Court's review. S. Ct. Rule 10. The petition does not identify a split among the circuits on the questions presented, nor does it identify an important but unsettled question of federal law. *Id.* Rather, the petition requests that this Court grant certiorari merely to correct the Court of Appeals' supposedly erroneous application of what the petition concedes are well-settled legal principles. In such circumstances, review by this Court would not be warranted even if Labora was correct that the court below erred. In any event, for the reasons explained below, the Court of Appeals properly applied this Court's precedents in affirming the District Court's mootness determination.

I. THIS COURT'S DECISION IN FRIENDS OF THE EARTH DOES NOT ALTER THE VALIDITY OF THE LOWER COURTS' DECISIONS IN THIS CASE

FOE involved a citizen suit brought under the Clean Water Act seeking injunctive relief and civil penalties to compel defendant's future compliance with a wastewater discharge permit. The District Court awarded a civil penalty as a deterrent to forestall future violations of the permit by defendant. 120 S.Ct. at 700. The Court of Appeals for the Fourth Circuit vacated the District Court's award, holding that the case became moot after defendant voluntarily came into

compliance with its permit after suit was instituted, but before judgment was entered. *Id.* This Court reversed, holding that a defendant ordinarily may not moot a case requesting prospective relief to halt allegedly ongoing misconduct by voluntarily ceasing that conduct. *Id.*

The Court's decision in *FOE* does not warrant a grant of certiorari here. First, *FOE* merely restated the "well settled" voluntary cessation doctrine. 120 S.Ct. at 708. The Eleventh Circuit, of course, was well aware of that doctrine when it issued the judgment below. *see, e.g., Jews for Jesus, Inc. v. Hillsborough County Aviation Auth.*, 162 F.3d 627, 629 (11th Cir. 1998); *Socialist Workers Party v. Leahy*, 145 F.3d 1240, 1247 (11th Cir. 1998); *Secretary of Labor v. Burger King Corp.*, 955 F.2d 681, 684 (11th Cir. 1992), and nothing this Court said in *FOE* changed the law prevailing in the Eleventh Circuit. In short, there simply is no reason for this Court to require the Eleventh Circuit to revisit its mootness determination in light of *FOE*.

In any event, *FOE* is simply irrelevant in this case. In its opinion in that case, this Court explained that "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." 120 S. Ct. at 708 (*quoting City of Mesquite v. Aladdin's Castle, Inc.* 455 U.S. 283, 289 (1982)). This doctrine necessarily assumes that, prior to the defendant's voluntary cessation, the court has before it both a claim of an unlawful practice and a request to enjoin or declare illegal the challenged practice. Indeed, the cases in which this Court has applied the "voluntary cessation" doctrine have all uniformly involved requests for declaratory and/or injunctive relief to forestall the

continuance of an allegedly illegal practice or the enforcement of an allegedly unconstitutional law.[2]

Labora's complaint, however, does not request prospective relief to halt a challenged practice. Rather, Labora alleged only that MCI had engaged in alleged "improper billing practices" which resulted in improper charges on the April Bill, R1-1-1, 3-4, and he sought only monetary damages for these alleged previous overcharges. R1-1-7-9. These damages were mooted by the credit issued by MCI. Since Labora made no claim for prospective relief to halt allegedly ongoing misconduct, no issue is presented regarding whether MCI mooted such a claim by voluntarily ceasing the challenged conduct. For these reasons, *FOE* is simply irrelevant to this case.[3]

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[2] *See, e.g., Erie v. Pap's A.M.*, 2000 U.S. LEXIS 2347 (2000) (requesting injunction against enforcement of anti-nudity ordinance); *Northeastern Fla. Contractors v. Jacksonville*, 508 U.S. 656 (1993) (requesting declaratory and injunctive relief to prevent enforcement of minority business set-aside ordinance); *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986) (request for injunctive relief to halt the application of allegedly unconstitutional union procedures); *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283 (1982) (request for injunction to prevent enforcement of licensing ordinance); *Preiser v. Newkirk*, 422 U.S. 395 (1975) (seeking declaratory and injunctive relief against prison officials); *U.S. v. W. T. Grant Co.*, 345 U.S. 629 (1953) (applied the voluntary cessation doctrine in the context of a case seeking to enjoin interlocking corporate directorships); *Walling v. Helmerich & Payne*, 323 U.S. 37 (1944) (applied voluntary cessation doctrine in case seeking injunctive relief from alleged violation of Fair Labor Standards Act).

[3] In the petition, Labora appears to suggest, relying on *FOE*, that the District Court erred in concluding that the case was moot without reaching the question whether he had Article III standing. Pet. at 10. While plaintiffs' standing was contested by the defendant in *FOE*, MCI has never suggested that Labora lacked standing to file the complaint, and indeed the courts below implicitly must have concluded that he had standing. In such circumstances, his suggestion that the courts below erred by not explicitly

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II. LABORA'S ALLEGATIONS OF MISAPPLICATION OF SETTLED PRINCIPLES OF LAW DO NOT WARRANT REVIEW

A. The Credit Issued By MCI Mooted Labora's Claims

Labora argues – as he did below – that MCI's reimbursement of the charges for disputed calls on the April Bill did not moot the case, because he never consented to the reimbursement. In support, he cites *Guaranty Nat'l Bank v. Roper*, 445 U.S. 326 (1979), in which the Court held that the defendant bank could not unilaterally moot a dispute by tendering a reimbursement for damages which plaintiffs rejected. (*See* Pet. at 14-16.) This case, however, is very different from *Guaranty Nat'l Bank*. While the plaintiff in *Guaranty Nat'l Bank* rejected the tender, here MCI had a right under its tariff *in its sole discretion* to credit Labora's account. (*See* R1-15-Exh. 1.)[4] Thus, unlike the plaintiffs in *Guaranty Nat'l Bank*, Labora was bound to accept MCI's credit, and there is no unaccepted offer of tender here.[5]

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addressing an uncontested issue (which implicitly was found in his favor) is puzzling.

[4] The tariffs authorize MCI to "grant credits against usage . . . in an amount not to exceed $1,000.00 per customer or account, per monthly billing period, whenever the Company determines, *in its sole discretion*, that such a credit is warranted due to considerations involving the delivery of past service to the customer or account receiving the credit" (R1-15-Exh. 1 at ¶ 7.18; emphasis added).

[5] Labora states that the argument that he consented to the refund by virtue of the tariffs "has been specifically rejected by the courts" and cites four cases in support. *See* Pet. at 23, n. 40 and accompanying text. None of the cases cited in n. 40 supports Labora's statement. These cases do not address the circumstances present here – a plaintiff who by tariff or for any other reason is bound to accept the credit tendered by defendant.

MCI's tariffs on file with the Federal Communications Commission govern the rights and liabilities of MCI *vis-à-vis* its customers. *See, e.g., MCI Telecommunications Corp. v. Graham*, 7 F.3d 477, 479 (6th Cir. 1993); *Cahnmann v. Sprint Corporation*, 133 F.2d 484, 487 (7th Cir. 1998); *Marcus v. AT&T Corp.*, 138 F.3d 479, 488-89 (2d Cir. 1998). *See also AT&T Co. v. Central Office Telephone, Inc.*, 524 U.S. 214, 217 (1998) (finding that the filed rate doctrine applies not only to rates, but also to "classifications, practices, and regulations affecting such charges"). Although Labora claimed that he never consented to the credit, he acknowledged that the tariff binds MCI and shows "all charges for each telephone service it provides, as well as all classifications, practices, and regulations affecting those charges" (Appellant's Eleventh Circuit Brief at 13-14). Once Labora received credit for the full amount of the dispute, he had no further interest in the case.

Nor does Labora's claim for attorneys' fees resuscitate his mooted claim. In *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 480 (1990), this Court held: "[A]n interest in attorneys' fees is, of course, insufficient to create an Article III controversy where none exists on the merits of the underlying claim." This issue has been decided by this Court and there is no need to revisit it.

B. The Amount Of The Credit Was Sufficient To Moot Labora's Claims

Labora alleges that the total of allegedly improper charges on the April Bill came to at least $1.57 and that MCI's credit of $1.52, therefore, had not reimbursed him in full for his alleged damages.[6] He refers throughout the Petition to the "partial

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[6] *See* Pet. at 16: "MCI still retained and Petitioner was still owed money for at least one . . . of the contested [March 31, 1998] 'triplicate' calls."

refund" of "some but not all" of the allegedly improper charges (*see, e.g.*, Pet. at 2, 3, 6, 10, 12, 13, 16, 19, 21).

The District Court properly concluded that MCI had reimbursed Labora in full for the disputed charges, and the Eleventh Circuit affirmed that ruling. It is undisputed that Labora made at least two of the alleged March 31, 1998 calls, and therefore no credit was due for those calls. *See* R1-15-Exh. 2C-2G. In any event, that plainly is not an issue that warrants review by this Court.

C. The June Bill Did Not Establish That This Case Fell Within An Exception To The Mootness Doctrine

Labora argues that he presented evidence below establishing that this case falls within the exception to mootness for practices that were "capable of repetition but avoiding review" (Pet. at 9, 11, 20, 26, 28-29). No such evidence, however, was before the lower courts. The "evidence" that Labora claims would support the exception to the mootness doctrine consisted of the June Bill, which he sought to present as a basis for vacating the judgment of dismissal and which he said, without explanation, contained "questionable" charges. As explained above, the District Court properly held that the proferred "newly discovered evidence" was not timely under Rule 60(b)(2), and, therefore, not properly before the District Court. The District Court's decision not to consider this evidence was well within its discretion, and does not compel review by this Court.

D. The Class Certification Motion Does Not "Relate Back" Under These Circumstances

Labora also contends that this Court should review the issue whether his class certification motion "relates back" to the filing of the complaint, and therefore should have been decided

by the District Court. It is settled, however, that where there is no justiciable controversy at the time the motion for class certification is filed, there is nothing to which the motion can "relate back." *United States Parole Comm'r. v. Geraghty*, 445 U.S. 388, 404-07 (1980). Where, as here, the case was moot before the motion for class certification was filed, the "relation back" doctrine is inapplicable.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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